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EXAMINER

SMITH, KIMBERLY S

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BETSIE MARSHALL DAVIS BROOKS RAKOCZY

Appeal 2008-2075
Application 10/647,006
Technology Center 3600

Decided: September 16, 2008

Before LINDA E. HORNER, ANTON W. FETTING, and MICHAEL W.
O'NEILL, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Betsie Marshall Davis Brooks Rakoczy (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of claim 2. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.¹

THE INVENTION

The claimed invention relates to a support stand system for a liquid dispensing bottle.

Claim 2, reproduced below, is the subject matter on appeal.

2) A support system stand for a liquid dispensing bottle having a dispensing apparatus being angularly disposed from the body, the dispensing apparatus having a tube with a pet/animal activated mechanism, comprising;

a support base having a supplemental lower plate and a vertical support member with an upper edge, lower edge, inner face and outer face, the lower edge of the vertical support member being coupled to the supplemental lower plate; and

a bottle retaining member including a vertical backing member with a lower horizontal holding member coupled to the vertical backing member of the retaining member, the bottle retaining member also having two horizontal holding members, each with an opening coupled to the vertical backing member of the retaining member at a position above the lower horizontal holding member, the bottle retaining member including two laterally spaced threaded bolts for vertically adjustable coupling to the vertical member of the support base in a manner to preclude rotation.

¹ Our decision will make reference to Appellant's Appeal Brief ("App. Br.," filed Nov. 24, 2006) and the Examiner's Answer ("Answer," mailed Feb. 26, 2007).

THE PRIOR ART

The Examiner relies upon the following as evidence of unpatentability:

Highwood	US 2,615,238	Oct. 28, 1952
Ziaylek	US 4,848,714	Jul. 18, 1989

THE REJECTIONS

The following rejections are before us for review:

Claim 2 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Ziaylek and Highwood.

The Examiner's findings to support the rejection are on page 3 of the Answer.

The Appellant contends that "there is no teaching in the prior art for the combination proposed by the Examiner and that the teachings of the Examiner's prior art was [sic, were] from diverse technologies, disclosures which teach away from that which applicant has invented and is now claiming." (App. Br. 4.) The Appellant contends that "[t]here can be found no teaching in Ziaylek for attaching it [the bottle retaining member 10] to a support base of the Highwood type. Conversely, there is no teaching in Highwood for accepting a bottle retaining member as disclosed in Ziaylek." (App. Br. 5.) The Appellant contends that "there is no disclosure whatsoever, anywhere in the prior art, of applicant's specifically claimed 'bottle retaining member including two laterally spaced threaded bolts for vertically adjustable coupling to the vertical member of the support base.'" (*Id.*)

ISSUES

The issue before us is whether the Appellant has shown that the Examiner erred in rejecting claim 2 under 35 U.S.C. § 103(a) as being unpatentable over Ziaylek and Highwood. This issue turns on whether the Appellant has shown there is insufficient evidence for a *prima facie* case of obviousness or has rebutted the *prima facie* case of obviousness with evidence of secondary indicia of nonobviousness. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

FINDINGS OF FACT

We find that the following enumerated findings of fact are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

Scope and content of the prior art

1. Ziaylek describes a bottle retaining member 10 including a vertical backing member 12 with a lower horizontal holding member 20 coupled to the vertical backing member 12 of the bottle retaining member 10. The bottle retaining member 10 also has two horizontal holding members 24, each with an opening (see figure 1) coupled to the vertical backing member 12 of the bottle retaining member 10 at a position above the lower horizontal holding member (again see figure

- 1). The bottle retaining member 10 has two laterally spaced threaded bolts 27. These threaded bolts 27 are used to connect the horizontal holding members to the vertical backing member 12 and connect the vertical backing member to the wall W. (Ziaylek, col. 3, ll. 7-60; Figs. 1 and 4-8.)
2. Highwood describes a support base having a supplemental lower plate 2 and a vertical support member 4 with an upper edge, lower edge, inner face, and outer face (unnumbered, see Figures 1 and 2). The lower edge of vertical support member 4 is coupled to the supplemental lower plate 2. (Highwood, col. 2, ll. 34-36.) In addition, Highwood describes a lower horizontal holding member 31 (the accessory unit shown in Figure 3). The lower horizontal holding member 31 is coupled to vertical support member 4. (Highwood, col. 3, ll. 34-55.)

Differences between the claimed subject matter and the prior art

3. The claimed invention combines elements separately disclosed in the Ziaylek and Highwood.

Level of ordinary skill in the art

4. Neither the Examiner nor Appellant has addressed the level of ordinary skill in the pertinent art of support systems for cylindrical dispensing bottles and tanks. As such, we will therefore consider the cited prior art as representative of the level of ordinary skill in the art.

Secondary considerations

5. There is insufficient evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S. Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”) The Court in *Graham* further noted that evidence of secondary considerations “might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.” 383 U.S. at 17-18.

The Supreme Court emphasized that “the principles laid down in *Graham* reaffirmed the ‘functional approach’ of *Hotchkiss*, 11 How. 248.” *Id.* (citing *Graham*, 383 U.S. at 12 (emphasis added)), and reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR* at 1739. The operative question in this “functional approach” is “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR* at 1740.

ANALYSIS

In reaching our decision in this appeal, we have given careful consideration to the Appellant's Specification and claims, to the applied prior art references, and to the respective positions articulated by the Appellant and the Examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the Examiner is sufficient to establish a prima facie case of obviousness with respect to claims. The Appellant's arguments do not persuade us that the Examiner erred in making the prima facie case of obviousness. Accordingly, we will affirm the Examiner's decision to reject the claims under 35 U.S.C. § 103. Our reasoning for this determination follows.

The Examiner finds the combination of Ziaylek and Highwood describes the elements of claim 2. (Answer 3.) We find likewise that the combination of Ziaylek and Highwood describes the elements of claim 2. (Facts 1 and 2.) The difference between the claimed invention and the combination of Ziaylek and Highwood is that the claimed invention combines the elements separately disclosed in Ziaylek and Highwood. (Fact 3.) Accordingly, the elements of claim 2 appear to be a combination of elements described in Ziaylek and Highwood. We see no unpredictable results from combining these prior art elements and the Appellant has not come forward with sufficient evidence showing the combination to yield a result that would have been unpredictable to one of ordinary skill in the art. Under these circumstances, the combination would have been obvious. *See KSR* at 1740:

Finally, in *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 96 S. Ct. 1532, 47 L.Ed.2d 784 (1976), the Court derived from the precedents the conclusion that

when a patent “simply arranges old elements with each performing the same function it had been known to perform” and yields no more than one would expect from such an arrangement, the combination is obvious. *Id.*, at 282, 96 S. Ct. 1532.

We are not persuaded by the Appellant’s contention that “there is no disclosure whatsoever, anywhere in the prior art, of applicant’s specifically claimed ‘bottle retaining member including two laterally spaced threaded bolts for vertically adjustable coupling to the vertical member of the support base.’” (App. Br. 5.) Ziaylek describes the two laterally spaced threaded bolts. (Fact 1.) These bolts are used to mount the vertical backing member to the wall. (Fact 1.) Accordingly, these bolts are readily capable of mounting the vertical backing member described in Ziaylek to the vertical member of the support base described in Highwood.

Concluding the establishment of a prima facie case of obviousness by the Examiner, we turn now to whether the Appellant has come forth with objective evidence of secondary considerations for us to review in order to rebut the prima facie case of obviousness established by the Examiner. The Appellant has not come forward with sufficient evidence of secondary considerations for us to review. (Fact 5.) Having the combination of claimed elements within the prior art and insufficient evidence of unpredictable results from said combination of elements and thus the prima facie case of obviousness established, we look to evidence in the record of secondary considerations to rebut the prima facie case of obviousness. Not seeing sufficient evidence in the record of secondary considerations, we conclude the Appellant has not rebutted the prima facie case of obviousness

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established by the Examiner. Accordingly, we will sustain the Examiner's rejection of claim 2.

CONCLUSIONS OF LAW

We conclude that the Appellant has not shown that the Examiner erred in rejecting claim 2 as being unpatentable over Ziaylek and Highwood.

DECISION

The Examiner's decision to reject claim 2 as being unpatentable over Ziaylek and Highwood is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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